STATE OF MICHIGAN

COURT OF APPEALS

WILHELM & ASSOCIATES REALTORS, INC.,

Plaintiff-Appellee,

V

AL LANGER,

Defendant-Appellant.

UNPUBLISHED
December 18, 2001

No. 225549
Oakland Circuit Court
LC No. 96-530735-CZ

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Following a trial on claims of promissory estoppel and fraud, the jury found in favor of plaintiff in the amount of $40,000. Defendant appeals by right the trial court's order of judgment entered in accordance with the jury's verdict. We affirm.

Defendant approached plaintiff to submit an offer to purchase a piece of real property. The offer was irrevocable for a period of five days, but it was never accepted. Defendant pursued the property through an alternative avenue and requested plaintiff to withdraw his offer. Plaintiff claims that defendant verbally agreed to compensate him for withdrawing the offer during the period of its irrevocability.

On this appeal, defendant argues that the trial court erred in denying his motions for JNOV and for a new trial. We disagree. A trial court's decision on a motion for JNOV is reviewed de novo. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). In reviewing the decision, this Court views the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998), quoting *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Forge, supra* at 204, quoting *Orzel, supra* at 558. "A motion for a new trial may be granted when the jury's verdict was against the overwhelming weight of the evidence." *Snell v UACC Midwest, Inc*, 194 Mich App 511, 516; 487 NW2d 772 (1992). "The trial court's decision with regard to the motion will not be reversed absent an abuse of discretion." *Id.*

Defendant first argues that plaintiff's claim is only a pretext for the recovery of a real estate commission; thus, it is unenforceable absent a writing. We disagree. We find that defendant's oral promise to "take care of" plaintiff if plaintiff agreed to withdraw the offer occurred outside the real estate transaction. Plaintiff's claims are based on defendant's promise

to compensate plaintiff in consideration of plaintiff's early withdrawal of the offer; thus, this was not a claim for a real estate commission.

Defendant also argues that his alleged promise to pay plaintiff was not sufficiently clear and definite for purposes of promissory estoppel. We disagree. Defendant made his promise to plaintiff in direct response to plaintiff's inquiring about the loss of his potential commission if plaintiff withdrew the offer. When asked about the commission, defendant stated "don't worry," and "I'll take care of you." In response to what that meant, defendant stated, "I'll pay you." Under the circumstances of this case, defendant's promise was sufficiently clear and definite for a jury to reasonably conclude that plaintiff was justified in relying on it. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993).

Defendant next argues that plaintiff failed to produce any proof of actual damages because he failed to offer any proof that the offer, as submitted and withdrawn by plaintiff, would have been acceptable to the sellers. Although the evidence was conflicting with regard to the issue of damages, we cannot conclude the trial court erred in denying defendant's motion for JNOV or new trial. Plaintiff did not seek a commission under the underlying real estate transaction; rather, plaintiff sought damages under defendant's subsequent oral promise to pay plaintiff for early withdrawal of the offer. Plaintiff's damages arise not only from the sale not being consummated, but also arise from his giving up his ability to pursue the offer. We find this issue was properly before the jury.

Defendant next argues that plaintiff was bound by defendant's testimony regarding whether the offer was acceptable to the sellers. Defendant cites to authority that stands for the proposition that "a party litigant calling the opposite party for cross-examination under [MCL 600.2161] is bound by the testimony elicited unless such testimony is contradicted by other proofs or is inherently improbable or incredible." *Gregg v Goodsell*, 365 Mich 685; 688; 113 NW2d 923 (1962); *Jackson v Fox*, 69 Mich App 283, 286; 244 NW2d 448 (1976). The trial court found defendant's testimony incredible. Deference must be given to the trial court's superior opportunity and ability to judge the credibility of the witness. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Thus, plaintiff was not bound by defendant's testimony.

Defendant next argues it was error for the trial court to allow plaintiff to testify regarding to what the listing broker represented to be the asking price for the subject property as evidence of the parties' states of mind. Defendant cites no authority for his position. A party may not merely state a position and leave it to this Court to find support for it. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). Defendant has shown neither how he was prejudiced by the introduction of this testimony, nor that the trial court abused its discretion by admitting the testimony.

Defendant next argues that it was error for the trial court to allow plaintiff to offer opinion testimony with regard to an industry standard commission rate and with regard to the acceptability of an offer. Defendant admits that there was no written agreement between the listing agent and the sellers regarding a commission. Because there was no actual contract between the two other than what was in the offer that was ultimately accepted by the sellers, plaintiff was not required to prove the actual rate of commission. Regardless, plaintiff received less than a one-half share of the eight percent he would have been entitled to under the offer that

was ultimately accepted; consequently, defendant has shown no prejudice. The trial court did not abuse its discretion in allowing the testimony. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Finally, defendant alleges error with several of the jury instructions. On appeal, claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). Jury instructions should be reviewed in their entirety, not extracted piecemeal to establish error in isolated portions. *Cox v Flint Bd of Hospital Managers (On Remand)*, 243 Mich App 72, 83, 85; 620 NW2d 859 (2000). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A).

First, defendant argues that the trial court erroneously rejected his requested instruction that plaintiff had a duty to follow defendant's instruction under an agency theory. Neither party sufficiently argued agency before the jury at trial, and defendant specifically denied that plaintiff was his agent; consequently, the requested instruction was not warranted, and the trial court did not err in refusing such instruction.

Next, defendant argues that the trial court erred by refusing a curative instruction regarding plaintiff's counsel's allegedly improper comments during closing arguments. Unless the comments "indicate a deliberate course of conduct designed to prevent a fair and impartial trial, there is no cause for reversal." *Cox*, *supra* at 89. Rather, reversal is required if prejudicial statements were made that reflected a studied attempt to inflame the jury or deflect its attention from the issues involved. *Id*. at 89-90. The disputed statements were made in direct response to similar comments made by defense counsel. Moreover, counsel merely told the jury that claims without legal merit would not be allowed to proceed to trial, but that the jury's duty was to decide the factual issues. Thus, the comments were not improper.

Finally, defendant argues that it was error for the trial court to omit any instruction on the issue of damages. Defendant did not object on the record below; thus, this issue is unpreserved. We review this unpreserved issue for manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). Manifest injustice results if the defect's magnitude constitutes plain error requiring a new trial or if it pertains to a basic and controlling issue. *Mina v General Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).

Defendant claims that the missing instruction on damages would have defined the elements and measure of damages, and instructed the jury of its duty to determine which of the elements had actually been sustained. The jury was instructed that one of the necessary elements of proof regarding promissory estoppel was that plaintiff was damaged as a result of his reliance on defendant's alleged promise. The evidence regarding damages was sufficiently before the

jury – the jury knew it had to find damages before it could award damages. Remand for a new trial on this issue is unnecessary.

We affirm.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey